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Paper No. 5

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**DEC 03 2001**

**OFFICE OF PETITIONS**

In re Application of :  
Faris et al. :  
Application No. 09/893,163 : ON PETITION  
Filed: June 27, 2001 :  
Attorney Docket No. 0126/1101.014 :

This is a decision on the petition filed September 28, 2001, requesting that the above-identified application be accorded a filing date of June 26, 2001, rather than the presently accorded filing date of June 27, 2001.

It is noted that the petition was directed to the present application, application No. 09/893,163, and to PCT application No. PCT/US01/20346. The petition has been placed in the file of application No. 09/893,163, the first listed application in the petition heading. This decision relates only to application No. 09/893,163. If a decision is desired in PCT application No. PCT/US01/20346, a separate paper directed specifically to that application should be filed. A second petition fee will also be required in the PCT application. See 37 CFR 1.4(b).

Petitioners request the earlier filing date on the basis that the application was deposited in an Express Mail drop box on June 26, 2001. However, petitioners acknowledge that the deposit was made after the last scheduled pick up for the day.

The petition is dismissed.

37 CFR 1.10(a) reads as follows:

Any correspondence received by the Patent and Trademark Office (Office) that was delivered by the "Express Mail Post Office to Addressee" service of the United States Postal Service (USPS) will be considered filed in the Office on the date of deposit with the USPS. The date of deposit with the USPS is shown by the "date-in" on the "Express Mail" mailing label or other official USPS notation. If the USPS deposit date cannot be determined, the correspondence will be accorded the Office receipt date as the filing date. See § 1.6(a).

Emphasis supplied. The petition is not accompanied by a copy of petitioners' Express Mail mailing label.<sup>1</sup> However, it appears

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<sup>1</sup> The original application transmittal letter identifies the Express Mail label number as EF357710345US.

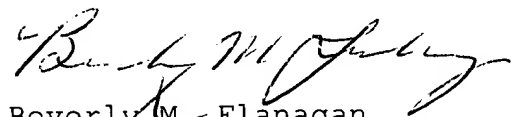
that the "date-in" on petitioners' Express Mail mailing label is June 27, 2001.<sup>2</sup> Therefore, according to the language of 37 CFR 1.10(a), the date of deposit of this application with the USPS is June 27, 2001, the filing date presently accorded the application.

Assuming arguendo that the petition establishes that the application was deposited in an Express Mail drop box on June 26, 2001, after the last scheduled pick up by counsel's employee and contrary to counsel's instructions, the petition fails to demonstrate that the situation described therein is so extraordinary as to warrant waiver or suspension of the language of 37 CFR 1.10(a) under 37 CFR 1.183.

The petition admits that counsel's employee could have deposited the application directly with an employee of the USPS to ensure receipt of a legible copy of the Express Mail mailing label with the "date-in" clearly marked as June 26, 2001. Instead, counsel's employee chose to deposit the application in an Express Mail drop box after the last scheduled pick up. Thus, petitioners assumed the risk of not receiving a copy of the Express Mail mailing label with the desired "date-in." Petitioners' failure to obtain a copy of the Express Mail mailing label with the "date-in" shown as June 26, 2001, could have been avoided by the exercise of due care. A party's inadvertent failure to comply with the requirements of a rule is not deemed to be an extraordinary situation that would warrant waiver of a rule under 37 CFR 1.183. See Nitto Chemical Industry, Co., Ltd. v. Comer, 39 USPQ2d 1778, 1782 (D.D.C. 1994) (Commissioner's refusal to waive requirements of 37 CFR 1.10 in order to grant priority filing date to patent application not arbitrary and capricious, because failure to comply with the requirements of 37 CFR 1.10 is an "avoidable" oversight that could have been prevented by the exercise of ordinary care or diligence, and thus not an extraordinary situation under 37 CFR 1.183.).

The application is being returned to the Office of Initial Patent Examination to await receipt of applicants' response to the Notice mailed August 20, 2001, and for further processing with a filing date of June 27, 2001.

Telephone inquiries should be directed to Petitions Attorney Steven Brantley at (703) 306-5683.



Beverly M. Flanagan  
Supervisory Petitions Examiner  
Office of Petitions  
Office of the Deputy Commissioner  
for Patent Examination Policy

Enclosure: Express Mail Information Database record  
concerning Express Mail label No. EF357710345US

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<sup>2</sup> The USPS Express Mail information database shows that the package bearing Express Mail label No. EF357710345US was accepted by the USPS at 12:45 AM on June 27, 2001, and was delivered or received by the USPTO on June 28, 2001. See enclosure.